



existing cable monopolies which are still largely unregulated. However, they remain concerned about possible telephone cross-subsidization of cable operations from monopoly loop revenues. One monopoly may end up merely replacing another, except once cable is precluded and its lines are removed, there may be a more absolute monopoly free from the prospect of potential competition from another existing loop. This concern does not lead to exclusion of telephone company entry into cable markets, because it does little good to have a potential competitor who is categorically precluded from competing. But it does indicate a strong public interest in regulating telephone entry to preserve continuing competition.

In *Assembly of the State of California v. Public Utilities Commission*, No. S044844, Assembly Speaker Willie Brown has petitioned the California Supreme Court to review the PUC's disposition of a \$49 million fund established to compensate Pacific Bell ratepayers for cross-subsidizing Pacific Tel-esis' development of its wireless operation, which it recently spun off as a new company called "AirTouch." In August 1994, the PUC decided that \$7.9 million should be allocated to PacBell ratepayers through a surcredit on monthly bills; \$40 million should be used for telecommunications programs and facilities in public schools statewide; and \$2.1 million should be used to continue the PUC's Telecommunications Education Trust. [14:4 CRLR 201-02] Speaker Brown argues that all of the money should be refunded to ratepayers, or it should revert to the state general fund. At this writing, the Supreme Court has not decided whether to review the PUC's decision.

## ■ FUTURE MEETINGS

The full Commission usually meets every other Wednesday in San Francisco.

## STATE BAR OF CALIFORNIA

*President: Donald Fischbach*

*Executive Officer:*

*Herbert Rosenthal*

*(415) 561-8200 and*

*(213) 765-1000*

*TDD for Hearing- and Speech-Impaired:*

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**T**he State Bar of California was created by legislative act in 1927 and codified

in the California Constitution at Article VI, section 9. The State Bar was established as a public corporation within the judicial branch of government, and membership is a requirement for all attorneys practicing law in California. Today, the State Bar has over 145,000 members, which equals approximately 17% of the nation's population of lawyers.

The State Bar Act, Business and Professions Code section 6000 *et seq.*, designates a Board of Governors to run the State Bar. The Board President is elected by the Board of Governors at its June meeting and serves a one-year term beginning in September. Only governors who have served on the Board for three years are eligible to run for President.

The Board consists of 23 members—seventeen licensed attorneys and six non-lawyer public members. Of the attorneys, sixteen of them—including the President—are elected to the Board by lawyers in nine geographic districts. A representative of the California Young Lawyers Association (CYLA), appointed by that organization's Board of Directors, also sits on the Board. The six public members are variously selected by the Governor, Assembly Speaker, and Senate Rules Committee, and confirmed by the state Senate. Each Board member serves a three-year term, except for the CYLA representative (who serves for one year) and the Board President (who serves a fourth year when elected to the presidency). The terms are staggered to provide for the selection of five attorneys and two public members each year.

The State Bar includes twenty standing committees; fourteen special committees, addressing specific issues; sixteen sections covering fourteen substantive areas of law; Bar service programs; and the Conference of Delegates, which gives a representative voice to 245 local, ethnic, and specialty bar associations statewide.

The State Bar and its subdivisions perform a myriad of functions which fall into six major categories: (1) testing State Bar applicants and accrediting law schools; (2) enforcing the State Bar Act and the Bar's Rules of Professional Conduct, which are codified at section 6076 of the Business and Professions Code, and promoting competence-based education; (3) ensuring the delivery of and access to legal services; (4) educating the public; (5) improving the administration of justice; and (6) providing member services.

Almost 75% of the Bar's annual \$56 million budget is spent on its attorney discipline system. The system includes the first full-time professional court for attorney discipline in the nation and a large staff of investigators and prosecutors. The

Bar recommends sanctions to the California Supreme Court, which makes final discipline decisions. However, Business and Professions Code section 6007 authorizes the Bar to place attorneys on involuntary inactive status if they pose a substantial threat of harm to clients or to the public, among other reasons.

## ■ MAJOR PROJECTS

**Bar Analyzes Recommendations of Discipline Evaluation Committee.** In August 1994, the "blue-ribbon" Discipline Evaluation Committee (DEC) chaired by retired U.S. Ninth Circuit Court of Appeals Judge Arthur L. Alarcón released a report of its eight-month evaluation of the State Bar's disciplinary system. Established in December 1993 by then-Bar President Margaret Morrow to conduct the first external review of the Bar's restructured discipline system, the DEC was to thoroughly evaluate the structure, cost, effectiveness, and fairness of all components of the Bar's system—including its Intake/Legal Advice Unit, Office of Investigations (OI), Office of the Chief Trial Counsel (OCTC), State Bar Court (SBC), and Complainants' Grievance Panel (CGP). While the DEC's final report contained high praise for the quality and quantity of adjudicative decisionmaking by the new State Bar Court, it nonetheless contained 52 recommendations on a wide spectrum of issues—including several which have caused controversy within the Bar. A major theme of the DEC report is that the Bar, particularly the State Bar Court, has devoted excessive resources to upper management and supervisory positions, while other components have been underresourced. [14:4 CRLR 209-10]

In September, new Bar President Donald Fischbach appointed Discipline Committee Chair James Towery to head the Task Force on Implementation of the DEC Report, and directed the Task Force to commence an initial analysis of the DEC report and recommend a procedure whereby the Discipline Committee and full Board could take action on those recommendations as appropriate. Fischbach instructed the Task Force to present its initial analysis at the Bar's October meeting.

Following two public hearings during September, the Task Force presented its analysis to the Board at its October 30 meeting. The Task Force categorized the recommendations in the DEC report as follows:

• **Recommendations that are already implemented or in place:** With regard to the State Bar Court, the Task Force noted that the Bar already reduced the time of two of its three Review Department judges



by 40% effective September 1, has not included the authorized seventh Hearing Department judge in its 1995-96 budget, and has not included funding for pro tem hearing judges in that budget. The Task Force also observed that the Bar listed its toll-free complaint number as a "consumer affairs" number in telephone directories in 1991.

• **Recommendations whose implementation is in process:** Among other things, the Bar has already commenced the rule-making process to establish permanent disbarment for egregious misconduct (*see below*); approved a voice mail system which will also reduce the busy rate on the discipline system's toll-free complaint hotline number; the SBC Executive Committee is planning to adopt standards for publication of its opinions and publish more selectively; and the Bar may sponsor statutory amendments to permit respondents to consent to discipline without admitting to culpability.

• **Recommendations that can be implemented in the last quarter of 1994 or the first quarter of 1995:** In this category, the Bar has commenced the rulemaking process to establish a five-year statute of limitations on the initiation of Bar disciplinary proceedings (*see below*); it is computerizing its discipline system forms to eliminate duplication of effort; and it will include information on the attorney discipline process in Bar public education programs.

• **Recommendations which require study:** The Task Force recommended, and the Board approved, that the bulk of the DEC recommendations be referred to the Board's Discipline Committee for further study. Among others, these include the following issues:

- whether the overall management of the discipline system should be delegated to the Bar's Executive Director, and whether reducing the costs of the discipline system should be a priority of senior management;

- expansion of summary disbarment for conviction of a felony or other crime involving moral turpitude;

- revision of the Bar's standards to increase sanctions for misconduct involving multiple clients, and to preclude substance abuse from being asserted as a mitigating factor;

- whether to publish the name of the respondent's law firm when publicizing the discipline of an attorney;

- whether to require disciplined attorneys to attend ethics school or other training programs (such as trust account management or client relations), and whether to require one hour in discipline and client

relations as part of the Bar's minimum continuing legal education requirement;

- replacement of the Complainants' Grievance Panel with an Office of Consumer Advocate;

- restructuring of the OCTC's prosecution unit;

- development of a procedure to review and address situations involving multiple complaints against an attorney which do not result in discipline;

- elimination of the separate Office of Investigations and of the deputy director positions within OI;

- reduction of support staff in the SBC and reduction in the number of hearing judges from six to four; and

- the implementation of staggered terms for SBC judges.

Also at the Bar's October meeting, Task Force/Discipline Committee chair James Towery announced the appointment of two subcommittees—the Subcommittee on the Office of the Chief Trial Counsel and the Complainants' Grievance Panel (OCTC/CGP) and the Subcommittee on the State Bar Court—to further study and analyze the DEC recommendations.

Prior to the Bar's December meeting, the OCTC/CGP Subcommittee isolated the core OCTC issues upon which the DEC focused and condensed them into a set of directives to the Chief Trial Counsel. The consensus was to direct the Chief Trial Counsel to develop models for the internal structure of the OCTC based on several identified "policy principles," such as systemwide teamwork and coordination among the components of OCTC, increased attorney supervision of investigations, prioritization and expedited processing of complaints, and identification and removal of structural impediments to cost efficiencies and public protection.

Interestingly, the Subcommittee focused on the Bar's "backlog statute" (Business and Professions Code section 6140.2) as "a major impediment to the discipline system operating in a cost-effective manner." The statute requires the Bar to investigate and dispose of complaints (either by way of dismissal, sanction, or referral for prosecution) within six months of receipt; a twelve-month period is allowed for cases classified as "complex." According to the Subcommittee, "the backlog statute has led to a discipline system in which the highest priority has become keeping as low as possible the number of backlog cases reported annually to the legislature....As a result, resources are allocated primarily based on the age of the complaint, rather than on the seriousness of the alleged misconduct, or upon the imminent threat to the public which the respondent

may pose. This has had the further negative consequence that the discipline system is 'complaint-driven,' that is, the system responds reactively to client complaints, rather than focussing proactively on more serious cases." The Subcommittee also opined that the Bar's annual reports of backlog status have created a false and misleading indicator of the Bar's performance. "In reality, these annual reports do nothing more than assess the success of the State Bar in investigating cases based upon the age of the complaint. The reports fail to assess the more critical issue of how well the system serves its mission in protecting the public." The Subcommittee recommended that the Chief Trial Counsel explore either deleting the backlog statute in its entirety or amending it (which will require legislation), and to explore alternative "and more meaningful" performance measurements for the discipline system.

Over the strong objections of the public members of the Complainants' Grievance Panel, the OCTC/CGP Subcommittee also voted unanimously on December 6 to recommend to the Discipline Committee that the CGP be abolished on December 31, 1995. CGP reviews closed complaints at the request of the complainant, and is authorized to request that OI reopen and reinvestigate a closed case; it also audits the performance of the Bar's discipline system through a random review of investigative files. In 1993, it requested reinvestigation in 33% of the cases it reviewed at the request of complainants, and requested reinvestigation in 16% of the cases it audited. [14:2&3 CRLR 224; 13:4 CRLR 214-15] The Subcommittee focused on the cost of the panel (\$840,000 annually) and generally agreed that the CGP's appeals process could be better handled through a new department reporting directly to the Bar's Chief Trial Counsel. Although several Subcommittee members were upset that they were being required to vote on the future of the CGP without a concrete proposal for its replacement from staff, Task Force Chair Towery promised that Chief Trial Counsel Judy Johnson would present a comprehensive proposal to the Discipline Committee at its January 20 meeting.

At its December 9 meeting, the Discipline Committee approved the timetable and policy principles established by the OCTC/CGP Subcommittee; it did not vote on the issue of CGP elimination. With the goal of presenting its response to the DEC recommendations to the full Board in March 1995, the Subcommittee—working with the Executive Director and the Chief Trial Counsel—is scheduled to re-



turn to the Discipline Committee at its January meeting with organizational models for OCTC and descriptions of pilot programs to test the models. Thereafter, these models will be sent for informal comment to interested entities and persons, and returned to the Discipline Committee in March.

At this writing, the Subcommittee on the State Bar Court is scheduled to begin work on implementing the DEC's recommendations in January. Its task does not promise to be easy. In November, the State Bar Court presented a detailed response to the DEC's findings that the SBC is "not cost-effective." SBC noted that the DEC failed to acknowledge that the court has underspent its annual budget by at least 11% per year since 1991, and failed to analyze any of the cost implications of its recommendations that the number of SBC judges and support staff be reduced. For example, SBC argued that implementing the DEC's recommendation that two of the court's six hearing judges be eliminated "would cripple the State Bar Court while only saving the membership about \$2 of the \$478 annual Bar dues (less than 1/2 of 1%)." SBC also noted that although it currently has five fewer staff members than it did in 1989, it now processes 2.5 times as many cases per year.

With regard to several faults in the case processing and decisionmaking practices of the State Bar Court identified by the DEC, SBC disagreed with what it characterized as "three key assumptions of DEC...: (1) that findings of fact and conclusions of law historically have not been mandated in Hearing Department decisions and are not currently mandated; (2) that de novo review by the Review Department has not historically been mandated and is not currently mandated; and (3) that the firestorm of pending complaints in 1985 has been permanently eliminated and 'entirely different circumstances...now prevail.'" SBC also strongly disagreed with the DEC's recommendation that the discipline system revert to management by a single individual charged with carrying out the policies of the Board of Governors; according to SBC, "[t]his recommendation is contrary to the dictates of the key 1988 reforms ensuring separation of powers and judicial independence so strongly recommended by...State Bar Monitor [Robert C. Fellmeth and]...is also contrary to the ABA McKay Commission's recommendations for reducing the role of elected bar officials nationwide and for strengthening the independence of each state's disciplinary officials which the New Jersey Supreme Court used as a basis for restructuring its system in the summer of 1994. In sum, DEC was seri-

ously mistaken in a number of its major assumptions. DEC's recommendations do not recognize either the full extent of the court's existing workload or the likely future workload of the court. Adoption of DEC's sweeping recommendations would seriously undermine the current ability of the State Bar Court to perform the vital functions which the Supreme Court has to date successfully entrusted to it and would jeopardize not only the 1988 reforms, but also the credibility of the entire discipline system with the public."

**Reappointment Process for State Bar Court Judges.** SB 1498 (Presley) (Chapter 1159, Statutes of 1988) created the State Bar Court, the nation's first full-time professional attorney disciplinary court. The SBC currently consists of six hearing judges (any one of whom may preside over a particular discipline case) and a three-judge Review Department (one of whom must be a non-attorney) which issues the final agency decision in State Bar discipline cases. Under Business and Professions Code section 6079.1, the Board of Governors is permitted to screen and rate all applicants for appointment or reappointment as a State Bar Court judge and submit at least three nominations for each vacancy to the Supreme Court "unless otherwise directed by the Supreme Court." The Supreme Court appoints SBC judges, and they serve for six-year terms. The fact that the initial terms of four of the six incumbent Hearing Department judges and the three incumbent Review Department judges expire on June 30, 1995 recently triggered a struggle within the Bar between the Board of Governors (which wants to retain as much input and control over the judicial appointment process as possible) and the State Bar Court (which fears excessive interference in judicial appointments by the Board, because the Board appoints the Chief Trial Counsel and oversees the Bar's prosecutorial office, and may favor judges who rule in favor of the prosecution).

At its August 1994 meeting, upon the recommendation of its Discipline Committee, the Board of Governors approved proposed amendments to Rule 961, California Rules of Court, regarding the procedure for the reappointment of State Bar Court judges. Under the Bar's proposal, a seven-member special committee appointed by the President of the Board of Governors (which could not include a current member of the Board's Discipline Committee) would review and evaluate the reappointment applications of incumbent judges, and submit a confidential report and recommendations to the Supreme Court; the special committee would notify

any incumbent judge if he/she has not been recommended for reappointment. At the same meeting, the Board voted to release the proposed amendments for a 45-day public comment period ending on October 11, transfer the proposal to the California Supreme Court, and designate the Discipline Committee as its agent to review and respond to the public comments received, and transmit the comments and any modifications it wishes to the Supreme Court by October 14. [14:4 CRLR 210-11]

During the comment period, two comments were received. One was from State Bar Court Review Department Judge Ken Norian, the court's only non-attorney, who suggested that the Bar nominate candidates to sit on the special committee; the Supreme Court would actually choose the members of the special committee, and would have the discretion to choose members not nominated by the Bar. Judge Norian also suggested that the Bar nominate former members of the Board of Governors to the special committee, rather than current members.

The other comment was from SBC Presiding Judge Lise Pearlman, who commended the Bar for eliminating the potential conflict of interest by not allowing a current member of the Discipline Committee to sit on the proposed special committee. However, she expressed continued concern over "the Board's insistence on the appointment of the seven-member special committee by the President of the State Bar..." Judge Pearlman reiterated the concurrence of the Executive Committee of the State Bar Court with the recommendations of the so-called "Wiener Committee" which she commissioned to come up with an alternative to the Board's proposal. The Wiener Committee, chaired by retired Justice Howard B. Wiener, found that it would be an intrusion on the judicial independence of the State Bar Court for the Bar to approve and select judges while at the same time overseeing the lead discipline enforcement personnel, and suggested that (1) the Supreme Court appoint the members of the special committee, or (2) utilization of the Bar's existing Judicial Nominees Commissions as the Supreme Court's agent for evaluating the proposed reappointments of sitting SBC judges.

The Discipline Committee, authorized by the Board to review and respond to the public comments, made no revision to the August version of the amendments to Rule 961, and transmitted the additional comments to the Supreme Court on October 13.

In December, the Supreme Court rejected the Bar's formulation and released its own amendments to Rule 961 for pub-



lic comment. Under the Court's rule, which addresses procedures for both the appointment and reappointment of SBC judges, the Court itself will create an Applicant Evaluation and Nomination Committee to solicit and evaluate applications for vacancies on the State Bar Court. The seven-member Committee is required to consist of four lawyers, two active or retired judges, and one public member; no more than two members of the Committee may be present members of the Board of Governors, and neither of those may sit on the Board's Discipline Committee. The Committee must evaluate the qualifications of all applicants and make recommendations to the Court after considering a variety of relevant factors (including—for reappointment purposes—prior service as a State Bar Court judge). The Committee must submit the names of at least three qualified candidates for each vacancy to the Court; at the same time it transmits its recommendations to the Court, the Committee must inform any incumbent seeking reappointment if he/she is not among the candidates recommended for appointment to the new term.

At this writing, the comment period on the Supreme Court's version of Rule 961 is scheduled to end on January 13.

**"Futures Commission" Circulates Interim Report for Public Comment.** On December 20, the Commission on the Future of the Legal Profession and the State Bar (also known as the "Futures Commission") released an interim report featuring a description of some of the Commission's recommendations. The Futures Commission was created in 1992 by then-Bar President Harvey Saferstein primarily in response to AB 687 (W. Brown), a serious legislative effort to abolish the "integrated" State Bar (part state agency; part trade association; mandatory membership) and replace it with a more traditional occupational licensing agency within the Department of Consumer Affairs. Speaker Brown later amended his bill to create a 21-member task force to study alternatives to the current structure of the Bar; Governor Wilson vetoed it because the composition of the task force did not include any gubernatorial appointees and because he thought a study "broader in scope and representation than that contemplated by this bill is warranted." [12:4 CRLR 233] The legislative and executive branch interest in restructuring the Bar served as a wake-up call to the Board of Governors, however, and the Futures Commission was created. [13:2&3 CRLR 219; 13:1 CRLR 140-41]

Although the original intent behind the Futures Commission was a study of the future of the integrated State Bar in regulating the legal profession in California,

the Commission quickly expanded its focus. In July 1993, the Commission adopted a mission statement which included (1) identification and examination of the factors which will significantly influence the delivery of legal services and the administration of justice over the next quarter-century; (2) development of a vision of the California legal profession of the future, which anticipates and effectively meets societal challenges over the next quarter-century; and (3) recommendations to the Bar of strategies and structures for meeting the future needs of the public and the profession and, in light of those future needs, proposals regarding the best frameworks for the governance of the lawyers of California. [13:4 CRLR 213-14]

Entitled *Summary and Highlights of Key Recommendations*, the Futures Commission's December 20 interim report provides a synopsis of many of the principal proposals adopted by the Commission. Recommendations in the key governmental areas of admissions, discipline, and Bar structure include the following:

- **Mandatory Bar for Admissions and Discipline**—A majority of the commissioners felt that admission into the profession and discipline of licensees should be handled by a mandatory bar. The Commission expressed its opinion that admissions and discipline are proper obligations of the profession as a whole, and should be performed and financially supported by a mandatory organization composed of all lawyers in the state.

- **Retain Integrated Bar Structure for All Current Functions**—By a 13-8 vote, the Commission decided to recommend that the integrated structure of the State Bar be maintained with its current functions and limitations. The report acknowledged that this recommendation, along with a competing recommendation to establish a voluntary trade organization for non-regulatory activities, "sparked an extended debate within the Commission." According to the report, the proponents of the mandatory bar structure carried the day by pointing to "an array of functions [which are] inherent or important within the context of a lawyer's professional and public obligations" and arguing that "the mandatory bar was best equipped to help the profession meet those needs." The majority also contended that "the unified structure still provides the best assurance that the profession will further the administration of justice." Although the Commission acknowledged that many complaints about the Bar are valid, it contended that these problems can be readily dealt with and "the baby shouldn't be thrown out with the bathwater." Some commissioners also

expressed concern that a voluntary bar could easily become dominated by attorneys in large urban areas and inattentive to the needs of traditionally underrepresented groups, such as rural and solo practitioners, women, and minorities.

The interim report did not include a synopsis of the public policy rationales of the dissenting commissioners who voted to disintegrate the Bar and delegate its state police powers to a traditional, non-trade association occupational licensing agency. The report's discussion of the competing recommendation to establish a voluntary trade organization for non-regulatory activities focused on the superior ability of a voluntary trade association to lobby effectively in the legislature (which the Bar, as a quasi-governmental agency precluded from using mandatory dues for certain lobbying activities by the *Keller* decision, lacks), and perceptions that the current Bar is too large, overly bureaucratic, and insensitive to the needs of its rank-and-file members. Most Bar critics agree that the Futures Commission's failure to substantively address the strong policy reasons for precluding the integrated Bar from administering state police power regulatory activities in its final report will no doubt encourage further legislative initiatives to abolish the integrated Bar (see LEGISLATION).

- **Bar Exam Educational Requirements**—The Commission recommended that only graduates of ABA- or California-approved law schools should be allowed to take the California Bar Examination.

- **Admissions Reciprocity**—The Commission agreed that licensure reciprocity should be available to active members in good standing, licensed for at least three years in another jurisdiction, who meet California's moral character and ethical standards, and are from a state which affords reciprocity to California attorneys.

- **Mandatory Malpractice Insurance**—The Commission agreed that professional liability insurance should be mandatory for all active members of the State Bar; if the minimum level of insurance is not maintained, a member would be suspended from practice. This recommendation finally implements a longtime suggestion of State Bar Discipline Monitor Robert C. Fellmeth. [11:4 CRLR 210-11]

- **Transfer State Bar Court to Supreme Court**—A majority of the Commission also recommended that the State Bar Court, which is currently part of the State Bar (see above), should be under the aegis of the California Supreme Court; such a transfer "may assist in strengthening the judicial role in attorney regulation and



thereby increase public confidence in the system."

• **Discipline as a Function of Judicial Branch**—The Commission agreed that the Bar's discipline function should continue to be a function of the judicial branch of government, and that fact should be publicized to lawyers and members of the general public (many of whom erroneously believe that the practitioner-controlled State Bar solely controls disciplinary decisions).

• **Supreme Court Appointment of Chief Trial Counsel**—The Commission recommended that the Bar's Chief Trial Counsel, who is the organization's chief prosecutor, be appointed by the California Supreme Court rather than by the elected Board of Governors.

The interim report also describes several measures which failed in a close vote or provoked lengthy discussion. These include a proposal to transfer the entire discipline system to the Supreme Court, the permanent disbarment concept (*see below*), limited practice without passage of the California Bar Exam for corporate counsel licensed in another state, and the creation of a voluntary bar association to administer the Bar's trade association activities (*see above*).

The Futures Commission also set forth a number of recommendations in other areas, such as administration of justice resources (including delivery of legal services to the poor, the development of effective forums for resolving legal disputes, and enhancement of public trust in the justice system), services which the Bar should provide to and for lawyers (such as advisory opinions on questions involving professional ethics, competence education, an orientation program for new admittees, and representation of the profession in the state legislature), and services to the public and professionalism (including the promotion of alternative dispute resolution, the augmentation of funding for legal aid programs, and the encouragement of legal internships for students, pro bono service by lawyers and law students, and public education by the legal profession). A significant recommendation in this area pertains to the creation of a new category of legal practitioner called legal technicians (also known as "independent paralegals") which has long been advocated as a way to ensure access to basic legal services and the justice system for low- and middle-income citizens. Here, the Futures Commission stated that "with proper safeguards first put in place, the legal profession should support a broader range of legal technician services to the public which will help achieve greater,

more meaningful access to the legal system for more Californians." Although a task force appointed by the Bar itself first proposed the legal technician concept in 1988 [8:3 CRLR 129-30], the Board of Governors has recently refused to consider any meaningful formulation of the legal technician concept. [11:4 CRLR 211; 11:3 CRLR 198; 11:2 CRLR 181]

At this writing, the public comment period on the Futures Commission's interim report is scheduled to end on February 28; the Commission is scheduled to meet in March to consider any comments submitted, and to approve its final report which will be submitted to the Board of Governors.

## Bar Proposes Trial Publicity Rule.

On September 26, Governor Wilson signed SB 254 (Kopp) (Chapter 868, Statutes of 1994), which Senator Quentin Kopp authored in direct response to what he calls "the staggering excesses of lawyers and witnesses in the O.J. Simpson criminal case." SB 254 enacted Business and Professions Code section 6103.7, which requires the Bar to formulate a trial publicity regulation governing out-of-court statements made by attorneys concerning civil and criminal adjudicative proceedings. SB 254 further requires the Bar to consider ABA Model Rule of Professional Conduct 3.6 in its deliberation, and to submit the rule to the California Supreme Court by March 1, 1995. [14:4 CRLR 214]

On October 11, the Bar's Committee on Admissions and Competence published proposed new Rule of Professional Conduct 5-120 for a 90-day public comment period. As published, the rule would prohibit a lawyer who is participating or has participated in the investigation or litigation of a matter from, directly or indirectly, making an out-of-court statement "that a reasonable person would expect to be disseminated by means of public communication," if the lawyer knows or reasonably should know the statement will have a "substantial likelihood of materially prejudicing" an adjudicative proceeding in the matter. The proposed rule, which is applicable to both civil and criminal cases and both plaintiff and defense counsel, also contains a "safe harbor" provision which lists several types of extrajudicial statements which attorneys are permitted to make. The Discussion section of the proposed rule notes that "[w]hether an extrajudicial statement violates rule 5-120 depends on many factors, including: (1) whether the extrajudicial statement presents information clearly inadmissible as evidence in the matter for the purpose of proving or disproving a material fact in issue; (2) whether the extrajudicial state-

ment presents information the member knows is false, deceptive, or the use of which would violate Business and Professions Code section 6068(d); (3) whether the extrajudicial statement violates a lawful 'gag' order to protective order, statute, rule of court, or special rule of confidentiality; and (4) the timing of the statement."

In releasing the proposed rule, State Bar President Donald Fischbach noted, "Limiting pretrial publicity is a most difficult task when trying to balance the right of free speech and the accused's right to a fair trial." Fischbach further stated that the Bar "also may become involved in establishing additional rules which will affect the ability of the profession to try a case in the media rather than in the courtroom."

The "substantial likelihood of material prejudice" language in Rule 5-120 is based on current ABA Model Rule 3.6 and the U.S. Supreme Court's plurality decision in *Gentile v. State Bar of Nevada*, 498 U.S. 1023 (1991) [11:4 CRLR 213-14; 11:3 CRLR 202], in which the Court considered a disciplinary action that had been imposed on a Nevada lawyer by the Nevada Supreme Court for allegedly improper extrajudicial statements. Nevada's trial publicity rule contained both the "substantial likelihood of material prejudice" standard and a safe harbor provision. Although the Court reversed the state's disciplinary action because the attorney's statements appeared permissible under the state's vague safe harbor provision, Chief Justice Rehnquist's plurality opinion upheld the "substantial likelihood" test as constitutional, "for it is designed to protect the integrity and fairness of a state's judicial system, and it imposes only narrow and necessary limitations on lawyers' speech."

Due to the controversial nature of the proposed rule, the Bar scheduled two public hearings to receive comments—one on November 29 in San Francisco and another on December 1 in Los Angeles. Out in force to oppose the rule were representatives of the American Civil Liberties Union of Southern California, California Attorneys for Criminal Justice, the Freedom of Information Committee of the Society of Professional Journalists, the California Newspaper Publishers Association, and the Los Angeles County and San Francisco bar associations. Most argued that the rule is an unnecessary overreaction to a unique high-profile case; the language of the proposed rule provides no standard or definition of the term "material prejudice"; and the safe harbor provision should be expanded to permit attorneys to make statements in reaction to recent publicity not initiated by that attor-



ney or that attorney's client, when the attorney's statements are "explanatory and informative." Among the very few who spoke in favor of the rule was Senator Kopp, who noted that California is one of only a handful of states which have declined to adopt ABA Model Rule 3.6. Senator Kopp also noted that the legal profession is held in low esteem by the public, and the Bar's refusal to responsibly curb its members' out-of-court statements would exacerbate that problem. Finally, he emphasized that lawyers are not simply advocates for their clients; they are officers of the court, and owe a duty to protect the integrity of judicial proceedings.

The Bar accepted public comments on proposed Rule 5-120 until January 9; at this writing, staff is analyzing the comments received and preparing to submit the issue to the Board's Committee on Admissions and Competence at its January 20 meeting, and to the Board of Governors at its January 21 meeting.

**Statute of Limitations Concerning Initiation of Disciplinary Action.** At its October 29 meeting, the Discipline Committee voted to release for public comment its proposal to establish a disciplinary statute of limitations, as recommended by the DEC (*see above*); currently, there is no limit, and AB 1544 (W. Brown), which would have imposed a one-year statute of limitations, was vetoed by Governor Wilson in 1993. [13:4 CRLR 217] The proposal would require a revision to the Rules of Procedure of the State Bar Court.

The proposed amendment would require the Bar to initiate a disciplinary proceeding "based solely on a complainant's allegation" of a violation of the State Bar Act or the Rules of Professional Conduct within five years from the date of the alleged violation. The limitations period may be tolled under certain circumstances set forth in the rule, including continuing representation of the client/victim by the respondent attorney, the pendency of civil, criminal, or administrative proceedings arising out of substantially the same facts or circumstances, and the respondent's wilful concealment of facts constituting the violation or failure to cooperate with the investigation of the allegations. The proposed rule exempts from the five-year limitations period the authority of the Bar to initiate a disciplinary proceeding based on information received from a source independent of a time-barred complainant.

At this writing, the comment period is scheduled to close on January 26.

**Other State Bar Rulemaking.** The following is a status update on other proposed regulatory amendments which have

been considered by the State Bar in recent months and described in detail in previous issues of the *Reporter*.

• **Permanent Disbarment.** October 21 marked the close of the public comment period on the Bar's proposed amendment to Rule 951(f), which would provide for the permanent disbarment of an attorney from the Bar. Amended Rule 951(f) would prohibit an application for readmission or reinstatement if an attorney has been convicted of a felony involving moral turpitude, or the attorney has been found culpable of a violation of the State Bar Act and/or the Rules of Professional Conduct involving the misappropriation of clients' funds in an amount which would constitute grand theft under California law. [14:4 CRLR 211-12]

During the comment period, the Bar received two comments in support of the proposed amendment, and seven comments against it. Proponents of the amendment argued that it would increase the respect of the public for the Bar and for attorneys, as the public would be assured that an attorney who has committed acts of moral turpitude (such as stealing clients' trust funds) is never again permitted to practice law. Opponents argued that the rule would repudiate the concept of rehabilitation; reduce the motivation for lawyers to make restitution to their clients or engage in other rehabilitative activities; create an incentive to resign with charges pending, seek reinstatement five years later, and defend the state charges at that time; and forever deprive a lawyer of his/her livelihood.

Although the Discipline Committee was scheduled to discuss the proposed permanent disbarment rule at its December 9 meeting, consideration of the matter was postponed until January.

• **Rules of Procedure for State Bar Court Proceedings.** At its August 1994 meeting, the Board of Governors adopted revised Rules of Procedure of the State Bar of California; the rules were to become effective on January 1, 1995, subject to a 90-day public comment period ending on December 1. These revised rules replace the transitional and provisional rules which were temporarily adopted when the SBC was created in 1989. [14:4 CRLR 212-13; 14:2&3 CRLR 226]

During the comment period, the Bar received four comments. Chief Assistant General Counsel Robert A. Hawley determined that the comments either (1) sought technical corrections which do not substantively change the rules, (2) contained suggestions for further revisions of a substantive nature which have not yet been considered or were deferred for future

consideration, or (3) were suggestions for substantive revisions which have been previously considered and rejected. Hawley recommended that the Discipline Committee adopt the changes in category (1) above and reject the changes in category (3). He noted that consideration of the comments in category (2) would delay the implementation of the rules beyond January 1, 1995, and recommended that they be considered as part of a future revisions process.

At its December 9 meeting, the Discipline Committee adopted the Rules of Procedure, subject to the changes in category (1) above. They became effective on January 1.

• **Monetary Penalties for Disciplined Attorneys.** At its December 9 meeting, the Discipline Committee was scheduled to discuss the comments received on its proposal to adopt Guidelines for the Imposition of Monetary Sanctions in Attorney Disciplinary Proceedings pursuant to Business and Professions Code section 6086.13, which became effective on January 1, 1994. The Guidelines would establish two ranges of fines for disciplinary violations of the State Bar Act and the Rules of Professional Conduct (RPC)—an upper range (\$2,600–\$5,000 per violation) applicable to the most serious statutory or RPC violations, and a lower range (\$100–\$2,500 per violation) applicable to all other statutory or RPC violations. Under the Guidelines, the specific sanction to be imposed within the applicable range will be determined by the SBC judge upon application of specified criteria. Monetary sanctions will be paid into the Bar's Client Security Fund, which assists in compensating clients who have been victimized by the intentional dishonesty of their lawyers. [14:4 CRLR 213; 14:2&3 CRLR 224-25; 13:4 CRLR 215] However, the Discipline Committee postponed discussion of the monetary penalties guidelines until its March 1995 meeting.

• **IOLTA Account Rulemaking to Enhance Funding for Legal Services.** In July, the Bar's Committee on Legal Services published for comment a proposed change in the Rules Regulating Interest-Bearing Trust Fund Accounts for the Provision of Legal Services to Indigent Persons, which govern the Bar's Legal Services Trust Fund Program. The proposed rule would continue to require attorneys to deposit client trust account funds in regulated financial institutions, but would permit the institution to hold the funds either in interest-bearing accounts or in certain high-quality money market funds which are registered as a mutual fund pursuant to federal law and comply with Securities





and Exchange Commission regulations for money market funds. [14:4 CRLR 213; 14:2&3 CRLR 231] The comment period on the proposed rule change ended on October 20; at its December meeting, the Board of Governors approved the amendment.

• **Inactive Enrollment for Failure to Pay Fee Arbitration Awards.** At its August 1994 meeting, the Board of Governors adopted new Chapter 20 (Rules 840-851) of the Transitional Rules of Procedure on an emergency basis to enable it to implement its new authority under AB 1272 (Connolly) (Chapter 1262, Statutes of 1993). That bill added subsection (d) to Business and Professions Code section 6203; effective January 1, 1994, the new provision authorizes the Bar to enforce the awards of its Mandatory Fee Arbitration Unit by placing the attorney on involuntary inactive status if he/she fails to comply with a binding award. [14:4 CRLR 213; 13:4 CRLR 218] Following its emergency adoption of the proposed rules, the Bar published them for public comment until November 28; thereafter, the rule changes were approved by the Discipline Committee as part of the new Rules of Procedure of the State Bar of California (*see above*) and became effective on January 1.

• **California Legal Corps Rules.** At its July 1994 meeting, the Board of Governors approved proposed rules to govern the California Legal Corps (CLC), a multifaceted umbrella organization whose purposes are to enhance access to the legal system, encourage attorneys to provide legal services to those in need, and provide funding and support for projects that employ unique and creative ways to achieve these goals. The rules provide for the creation of a Legal Corps Commission to administer the rules and all provisions of law regarding the CLC and allocate CLC funds. [14:4 CRLR 213-14; 14:2&3 CRLR 225-26; 13:2&3 CRLR 218-19] These rules must be approved by the California Supreme Court before they become effective; at this writing, staff has yet to forward the rules to the court.

• **Gifts to Attorneys From Clients.** On October 19, the Bar forwarded its proposed amendments to Rule of Professional Conduct 4-400, regarding gifts to attorneys from their clients, to the California Supreme Court for approval. As amended, the rule reads as follows: "[A State Bar] member shall not: (A) induce a client to make any gift, including a testamentary gift, to the member or to a person whom the member knows is related to the member; or (B) prepare an instrument which provides for any gift from a client, including a testamentary gift, to the member or to a person whom the

member knows is related to the member, except where the client is related to the member or transferee." [14:2&3 CRLR 226-27; 14:1 CRLR 176; 13:4 CRLR 217] At this writing, the Supreme Court has not acted on the proposal.

• **Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Lawyers.** On September 30, the public comment period closed on the proposal of the Bar's Discipline Committee and its Committee on Admissions and Competence to adopt a revised version of Rule 1-311, regarding the employment of disbarred, suspended, and inactive lawyers. [14:4 CRLR 214; 14:2&3 CRLR 227; 14:1 CRLR 176]

As published by the committees, Rule 1-311 would prohibit a State Bar member from employing, associating professionally with, or aiding a person the member knows or reasonably should know is a disbarred, suspended, resigned, or involuntarily inactive member to perform the following on behalf of the member's client: (1) render legal consultation or advice to the client; (2) appear on behalf of the client in any hearing or proceeding or before any judicial officer, arbitrator, mediator, court, public agency, referee, magistrate, commissioner, or hearing officer; (3) appear as a representative of the client at a deposition or other discovery matter; (4) negotiate or transact any matter for or on behalf of the client with third parties; (5) receive, disburse, or otherwise handle the client's funds; or (6) otherwise engage in activities which constitute the practice of law. The revised rule would require a member to provide specified notice to affected clients and to the State Bar prior to employment of such a person, and to the State Bar following termination of the employment of such a person.

During the comment period, the Bar received 19 comments, of which only five supported the proposal. Those in opposition raised the following points: (1) the proposed rule is unnecessary because its provisions are contained in existing sections of the Business and Professions Code and the Rules of Professional Conduct; (2) the rule would restrict "tainted" attorneys from engaging in certain activities which non-attorneys are free to perform; and (3) the rule would make it almost impossible for a "tainted" attorney to find employment in a law firm setting.

At its October 28 meeting, the Committee on Admissions and Competence discussed the comments received and other policy considerations raised by the proposed rule. The Committee determined that the major concern is the scope of the rule's prohibited activities in that they ar-

guably include activities which a non-attorney may perform (thereby expanding the definition of the practice of law). Other problematic areas identified were the inability of the Bar to discipline the disbarred, because they are outside the Bar's jurisdiction; and the notice requirement to clients where the services to be performed do not involve legal services, which was generally perceived to discourage potential employers from hiring disciplined attorneys and create constitutional challenges.

Admissions Committee members agreed that the Bar should receive notice of the employment and that some notice should be provided to clients, but they disagreed on the implementation of the rule. Unable to resolve the issues, the Admissions Committee decided to refer the rule back to the Discipline Committee.

At its December 9 meeting, the Discipline Committee entertained a slightly revised version of the proposal, which would require a Bar member who hires a disciplined lawyer to "serve...written notice upon each client on whose specific matter such person will work, prior to or at the time of employing such person to work on the client's specific matter." However, the Discipline Committee also postponed consideration of the rule, and directed staff to research several issues, including the number of occurrences of this type of incident and other ways of addressing these concerns.

• **Copies of Significant Documents for Clients.** In September 1993, the Board of Governors forwarded proposed new Rule of Professional Conduct 3-520, which would require attorneys to provide to a client, upon request, one copy of any significant document or correspondence received or prepared by the attorney relating to the employment or representation, to the California Supreme Court for review and approval. [14:1 CRLR 176; 13:1 CRLR 142]

In May 1994, the Supreme Court returned the proposed rule to the Bar, with instructions to release it for comments from California superior and appellate courts, particularly with regard to the potential fiscal impact of the proposed rule on appellate courts in criminal cases in which counsel has been appointed by the court for indigent defendants. According to the Court, "[r]ecords and transcripts on appeal may consist of tens of thousands of pages. Such material arguably would be 'significant' to any appeal and it would appear that the cost of complying with the proposed rule, which would be passed on to the courts, could be considerable." The Court suggested that the Bar may wish, for example, to determine whether a defini-



tion of the term "significant" or some other means may be used to describe more precisely "an attorney's duty in the criminal appellate context or even in other instances in which an onerous fiscal burden may be placed on courts or counsel." Additionally, the Court suggested that the Bar contemplate including language in the rule to state that the rule does not supersede any other statutory or judicially-created protective orders or other nondisclosure agreements.

Accordingly, the Bar released the proposal for public comment in August, and closed the public comment period on November 21. At this writing, staff is analyzing the comments received and formulating a recommendation to the Bar.

## LEGISLATION

**SB 60 (Kopp)**, as introduced January 3, would implement the findings of the DEC report (*see above*) by limiting the total amount of annual Bar licensing fees to \$378 (\$100 less than the Bar's current fee of \$478 per year), with correspondingly lower fees imposed on attorneys admitted for less than three years. It would also require the Bar to conduct a plebiscite of its members to determine whether they favor changing the State Bar from a mandatory to a voluntary association, and report the results to the legislature by March 1, 1996. [*S. Jud*]

## LITIGATION

In *Brosterhous, et al. v. State Bar of California*, 29 Cal. App. 4th 963 (Oct. 27, 1994), the Third District Court of Appeal dealt a serious blow to the Bar's desire to limit challenges to its calculation of the expenditures which may be charged to Bar members in the form of annual dues. Although the trial court upheld the Bar's procedures which establish binding arbitration as the method of challenging the propriety of the Bar's dues calculations, the Third District reversed and ruled that the Bar's binding arbitration procedure does not preclude adjudication of alleged violations of the challengers' first amendment rights in a judicial forum.

This dispute has its roots in *Keller v. State Bar of California*, 496 U.S. 1 (1990) [10:2&3 CRLR 215-16], in which the U.S. Supreme Court struck down the Bar's use of compelled membership dues for ideological or political purposes unrelated to the Bar's primary purposes of "regulating the legal profession [or] improving the quality of legal services." The Court also required the Bar to adopt adequate procedures, such as those outlined in *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986), to protect the interests of objec-

tors. In response to *Keller*, the Bar adopted Article IA, procedures under which it is required to analyze and categorize its expenditures as "chargeable" or "non-chargeable," and offer all Bar members an opportunity to decline to pay the "non-chargeable" portion (the so-called "*Hudson* deduction"). Under Article IA, challengers may dispute the Bar's calculation of the "chargeable" portion, after which the Bar must place the disputed amount in escrow; if the Bar refuses to amend its calculations, the matter is submitted to binding arbitration, "subject to such appropriate review as determined by the Supreme Court."

For the 1991 dues year, the Bar computed the "non-chargeable" portion of its expenditures as amounting to \$3 per member. Plaintiffs paid their Bar dues under protest and challenged the calculation, contending that the actual "non-chargeable" amount was \$87 per attorney. All objectors then participated in a single, consolidated hearing before an arbitrator who ordered the Bar to refund an additional \$4.36 per challenger. [12:2&3 CRLR 270] Instead of seeking direct review of the arbitration award, plaintiffs commenced this action in superior court, alleging violation of their rights to freedom of speech and association, 42 U.S.C. section 1983, and Article 1, sections 2-3 of the California Constitution. [12:4 CRLR 237] The Bar demurred, claiming that the action is barred by the binding effect of the arbitrator's decision as provided in the Bar's procedures; the superior court sustained the demurrer in January 1993. [13:2&3 CRLR 223-24]

On appeal, the Third District decided that the issue is "whether Article IA, assuming it was lawfully adopted, establishes the exclusive remedy for adjudication of a *Keller* challenge to State Bar expenditures." Citing a long line of U.S. Supreme Court cases holding that a binding arbitration procedure does not preclude an independent judicial action alleging violation of statutory rights, the Third District held that the Bar may not confine the challengers' section 1983 claims to arbitration; "Congress intended such claim to be judicially enforced." To emphasize its point, the court cited several cases (including *Hudson*) in which an arbitration process had been developed precisely to decide first amendment claims; according to the Third District, "even an arbitration scheme devised specifically to adjudicate First Amendment claims, as in *Hudson*..., will not preclude an independent section 1983 judicial action."

In sum, the court held that "the procedures outlined in *Hudson* and applied to the State Bar in *Keller* were never intended to be a final adjudication of First

Amendment rights of objecting members. Rather, they provide interim relief designed to counterbalance the power of a labor union or integrated bar association to exact fees without first establishing that such fees will be used for legitimate organizational purposes." The Bar has filed a petition seeking review by the California Supreme Court of the Third District's decision.

On December 28, a 4-3 majority of the California Supreme Court reversed the First District Court of Appeal's decision in *Flatt v. Superior Court (Daniel, Real Party in Interest)*, 9 Cal. 4th 275. In this case, William Daniel approached attorney Gail Flatt and asked her to handle a possible legal malpractice action against Donald Hinkle, Daniel's former attorney. Less than one week later, Flatt advised Daniel she could not represent him because her firm had a conflict (it represented Hinkle in an unrelated action). Two years later, Daniel sued both Hinkle and Flatt for legal malpractice—his claim against Flatt was that she failed to warn him of the applicable statute of limitations governing his claims against Hinkle. Following discovery, Flatt moved for summary judgment on grounds she owed no duty to Daniel because no attorney-client relationship had ever been established. The trial court declined to grant Flatt's motion, on grounds there were triable issues of fact material to whether an attorney-client relationship had arisen between Flatt and Daniel. Flatt appealed; the First District affirmed. [14:2&3 CRLR 229-30]

Writing for the majority, Justice Armand Arabian disagreed with the lower courts' assumption that the question of Daniel's client status is material to the dispositive issue raised by Flatt's motion for summary judgment. Acknowledging that neither the parties' research nor its own had uncovered case authority squarely on point, the majority held that an attorney's duty of undivided loyalty to an existing client negates any duty on the part of the attorney to inform a prospective client of the statute of limitations applicable to a proposed lawsuit or even of the advisability of seeking alternative counsel. The majority warned that its holding is narrow and confined to the facts of this case, in which the attorney is confronted "with a mandatory and unwaivable duty not to represent the second client in light of an irremediable conflict with the existing client and acts promptly to terminate the relationship after learning of the conflict. We caution the bar that, in the absence of such an irreducible conflict and mandatory duty to withdraw, and attorney's duty to advise a new or even a 'prospective'





client, once the nonengagement decision has been taken, may well be more extensive...."

Justice Joyce Kennard authored a sharp dissent which found fault with the majority's entire approach. She noted that the majority failed to clearly address the two distinct issues presented in the case: whether Flatt owed a duty of care to Daniel, and—if so—whether that duty obligated her to advise him about the statute of limitations when she terminated her representation of him. In Justice Kennard's view, "once one assumes, as does the majority, that Daniel was Flatt's client, the conclusion is inescapable that Flatt owed a duty of care to Daniel." If that is true, then Flatt owed the same duty of care to Daniel as she did to Hinkle. "Instead, the majority myopically focuses solely on Flatt's duty to Hinkle, and holds that her duty of loyalty to Hinkle 'absolved her of a duty to provide any advice to Daniel adverse to the interests of Hinkle.'" Justice Kennard concluded that "the effect of the majority's decision is to create two classes of clients, and to hold that the duties owed to the first-engaged client (here, Hinkle) not only can negate the duties owed to the second-engaged client (here, Daniel) but can also immunize the lawyer from liability for injuring the second-engaged client to advance the interests of the first-engaged client. This result is unprecedented in the law....I cannot agree with the majority...that the reason Daniel should lose is that he belongs to a new species of client to whom lawyers owe no duty."

In *ITT Small Business Finance Corporation v. Niles*, 9 Cal. 4th 245 (Dec. 28, 1994), the California Supreme Court affirmed the Second District Court of Appeal's holding which interprets Code of Civil Procedure section 340.6 regarding the one-year statute of limitations on legal malpractice actions. Section 340.6 provides that legal malpractice actions commence running when the client discovers or should have discovered the facts constituting the malpractice; however, the statute is tolled during the time the client "has not sustained any injury." In this case involving a challenge to the adequacy of loan documents prepared by an attorney, the Second District and the Supreme Court held that the statute of limitations in a transactional legal malpractice action commences upon the entry of adverse judgment, settlement, or dismissal of the underlying action. [14:2&3 CRLR 230] The court again noted that its holding is narrow, and is limited to transactional legal malpractice cases where the adequacy of documentation is the subject of the dispute.

## ■ FUTURE MEETINGS

January 20–21 in San Francisco.

March 10–11 in San Francisco.

April 7–8 in Los Angeles.

May 19–20 in San Francisco.

